Child Custody Evaluations and the Need for Standards of Care and Peer Review

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To assist the court in identifying the best interest of children, psychiatrists and other mental health professionals are frequently appointed to perform child custody evaluations. Some locales require specific conditions to be met by qualified child custody evaluators while others do not. Thus, standards vary and ultimately affect how well the evaluations serve the families.

This article explores how mental health professionals make evaluations as well as common pitfalls that must be avoided. The article encourages the use of published standards and peer review by colleagues to guide forensic experts. Providing judges with knowledge on standards of care allows them to choose experts carefully and to weigh their contributions appropriately in this important area of family law. ■

There is no more complex and stressful work in the field of forensic mental health than the evaluation of child custody disputes. All who assess these cases can attest to the difficulties involved.

Courts across the United States have increasingly turned to psychiatrists and other mental health professionals to assist in these evaluations, especially as the guiding principle in custody disputes moved from the "tender years" doctrine to the "best interest of the child" in the latter half of the 20th century. Because the "best-interest" analysis focuses upon the child rather than favoring the mother as the custodial parent (as was generally the case with the "tender years" doctrine), courts recognized that they needed assistance in identifying just what a child's best interest would be.

It is now common practice in most jurisdictions for courts to request the assistance of mental health professionals who are knowledgeable in assessing children and their families and adept at communicating their findings to the court when the custody of a child is disputed. Psychiatrists—especially child and adolescent psychiatrists—are in particular demand because of their specialized expertise with families. In some locales, court-associated clinics provide on-site assessments; in other areas, practitioners in the community perform the evaluations. Unfortunately, standards for appointing experts vary, and all too often judicial determinations about who will do the evaluations are arbitrary and idiosyncratic. Given the importance of these evaluations—and their concomitant complexity and stress—there is a clear need for uniform standards for custody evaluators.

This article will address these issues as well as call attention to problems that may arise when experts with variable skills undertake child custody evaluations. It will also advocate for several mechanisms that can raise standards in this field and provide greater assistance to the courts, which would ultimately mean that families are better served.

HISTORICAL ANTECEDENTS OF CHILD CUSTODY DISPUTE RESOLUTION

Child custody disputes have continually served as mirrors to the soul of a society's view of families. In ancient Rome, a father could do with his children as he wished because they were legally considered his property. This state-sanctioned right of fathers continued well into the 19th century in English common law, including its use in the United States legal system.[1] Gradually, though, government became more involved with the welfare of children as the concept of *parens patriae, i.e.*, the state acting in the role of parent, took hold.[2]

In the late 19th and early 20th centuries, the discoveries of psychoanalysis were increasingly accepted and children came to be seen as unique persons with specialized

needs. The role of the mother was seen as paramount in the life of a child—especially a very young child. Courts began to favor mothers in custody disputes, and the "tender years" doctrine informed judicial opinion. This doctrine, although ill defined, provided that for about the first seven years of a child's life, the mother was the better parent to raise the child. In some early cases, however, courts reversed custody in favor of the father once the child reached the age of 7.

In the second half of the 20th century, as no-fault divorces became common, courts came to focus on the needs of the child rather than parental culpability. Earlier state court decisions, such as *Finlay v. Finlay*, in which the concept of "the best interest of the child" was articulated, came under closer scrutiny.[3] The tender years doctrine gave way to "best interest," and the emphasis was redirected to what the child needed rather than whether a mother or a father made the better parent. More than ever before, courts consulted psychiatrists and other mental health professionals and others in the course of evaluating their cases.

In the 1970s, clinical researchers and legal scholars came to recognize the limits (and ambiguities) of the best-interest concept and looked for ways around the pain and suffering of parents and children caught up in custody disputes. Some even suggested that the deficiencies of the best-interest presumption could not be corrected and called for an entirely new approach, that of "the least detrimental alternative."[4] This concept attempts to focus on the realistic needs of the child and recognizes that there are no "best" solutions in a child custody dispute—only ones of varying degrees of harm to the child. The aim of the courts, as suggested by this concept, should be to find the plan that causes the least amount of further damage to the child. The "least detrimental alternative" has merit and can assist clinicians in their evaluations of families; however, no states have adopted this method as the standard by which custody determinations are made.

One approach taken by some states has been to award joint custody to parents in an attempt to avoid the "war" that a custody dispute can create. In Connecticut, for example, joint custody is the rebuttable presumption that guides courts hearing these cases. However, other states, such as California, adopted joint custody as the legal presumption but later repealed the legislation.[5]

Joint custody was thought to be a panacea at one time but was found to have shortcomings.[6] It can work for some families and can be disastrous for others. Certain factors have been found to be predictive of successful and failed joint custody arrangements.[7] For example, parents who can put aside their anger and frustration with each other and can tolerate their differing parenting styles, as well as put the needs of their children first, have a much better chance of securing and maintaining a successful joint custody arrangement. Their children tend to have fewer emotional disturbances. On the other hand, parents who are unable to work through their anger and who may have their own emotional problems, including substance abuse, are not appropriate candidates for joint custody. For a court to award joint custody under such circumstances—particularly when one parent objects—ignores clinical research and makes a mockery of the best interest of the child.

The mental health professional conducting a child custody evaluation has the opportunity, after carefully assessing the personalities of the children and their parents, to make recommendations to the judge that are practical, realistic, and helpful for the particular family involved. The expert can advise the court whether joint custody could work, and if so, why. The evaluator provides assistance to the judge by uncovering and elucidating the factors militating for and against any particular custody plan.

STANDARDS FOR CHILD CUSTODY EVALUATIONS

In many locales, neither the courts nor mental health professionals are given any guidelines for performing child custody evaluations. Unfortunately, many judges assume that a child psychiatrist or psychologist, by virtue of his or her professional degree, already knows and understands how to undertake this task.

To correct the problem of varying levels of expertise and to bring some order to the process, other locales specify standards of practice for child custody evaluators. Rule 1257.3 of the California Rules of Court provides such uniform standards for court-ordered child custody evaluations. The rule pertains to both court-connected and private child custody evaluators appointed pursuant to the Family, Evidence, or Civil Procedure Codes.

The comprehensive guidelines in rule 1257.3 describe in detail the required scope of the child custody evaluation, including what kinds of data are to be collected and in what manner, how a written or oral presentation is to be fashioned, ethical considerations for the evaluator, and fee arrangements. The rule also calls for local courts to "provide for acceptance of and response to complaints about an evaluator's performance."[8]

Recent legislation requires the Judicial Council to "formulate a statewide rule of court by January 1, 2002, that establishes education, training, and license requirements for all child custody evaluators." The bill would also require all child custody evaluators, whether they are psychiatrists, psychologists, social workers, marriage and

family therapists, or others to "declare under penalty of perjury that they are currently licensed and meet all other requirements of the rule."[9] This new law represents an important advance in raising and maintaining standards of care for these evaluations.

EVALUATION STRATEGY

The mental health professional assisting the court in assessing families in custody disputes conducts a comprehensive evaluation. Every custody evaluation should begin with a well-thought-out strategy so that the clinician can follow the procedure that makes sense for a particular family. Initially, the clinician plans an evaluation strategy based upon who comprises the family, the number and ages of the children, whether outside agencies have been involved, and whether other collateral interviews will be necessary. In order to understand and follow the proper protocol for performing a custody evaluation, clinicians can be guided by procedures explicated in the psychiatric literature.[10]

COLLATERAL INTERVIEWS

Collateral interviews might involve in-person interviews with child-care providers or relatives such as grandparents, or telephone interviews with therapists who have seen the parents or child, teachers and/or the school principal, a guidance counselor, or a tutor. Parents may ask the evaluator to speak with a particular relative, friend, or neighbor. The evaluating mental health professional must assess whether speaking to someone outside the immediate family will be helpful or whether the interview will only add another person to the list of those for or against one of the parents. The clinician should consider the length of the report and the value of each collateral contact. More is not necessarily better. The clinician must not forget that he or she is a mental health professional and that it is the judge who is the trier of fact.

HOME VISITS

In addition to interviews held in the clinician's office, it may be appropriate for the evaluator to make a home visit to observe the child and parent in more natural surroundings. Of course, such a visit is not "natural," because everyone knows it is part of the custody evaluation. However, when an issue may be whether or not a particular home is appropriate for a child, a home visit may provide the evaluator with additional information, such as the child's playing and sleeping arrangements, where and how meals are served, and how "child-proof" the home has been made.

PSYCHOLOGICAL TESTING

Sometimes the evaluating clinician may consider administering psychological tests as part of the custody evaluation. The parents or other litigating caretakers are most commonly tested and occasionally the child. When the psychological health of one or both parents is a legitimate issue in a custody dispute or when the clinician feels the need for additional psychological information about the parents, testing can be helpful. When parents or other caretakers disagree about the psychological status of a child, testing of the child might clarify the issue.

However, as stated in section I.C.8 of the *Practice Parameters for Child Custody Evaluation*, published by the American Academy of Child and Adolescent Psychiatry,[11] the introduction of such tests within a custody evaluation can lead to increased battling over the meaning of raw data but may have little use in the assessment of parenting. Well-known tests, such as the Minnesota Multiphasic Personality Inventory, the Rorschach ("inkblot") test, the Thematic Apperception Test, and the various intelligence tests were not designed for use in parenting evaluations. The results of such tests may be helpful in validating an evaluator's clinical hypotheses or may serve to heighten conflict between litigants.

Several tests have been promoted as being specifically useful in custody evaluations. These include the Bricklin Perception of Relationships Test[12] and the Ackerman-Schoendorf Scales for Parent Evaluation of Custody.[13] Use of these tests is controversial at present and not universally accepted. They should be used cautiously, if at all. Indeed, no test should ever take the place of a comprehensive clinical evaluation by a trained mental health professional.

In general, mental health professionals performing child custody evaluations should do so only if they have been court appointed or agreed to by all sides. It is an egregious error for a clinician to be selected by one party, to perform a one-sided evaluation, or to offer an opinion based on interviews with only one of the parties. These and other professional standards and ethics will be discussed later (*see* "The 'Hired Gun'"). The evaluation strategy, psychological testing, and collateral interviews are all important. However, the "heart" of the evaluation lies in the actual clinical interviews.

THE CLINICAL INTERVIEWS

The evaluation consists of two major sections: the clinical interviews and the written report. What follows is a suggested paradigm of a very complete and comprehensive child custody evaluation. Such an evaluation is conducted when local jurisdictions can provide qualified staffing and sufficient time or when the litigants seek the services of a

private practitioner. The complete evaluation—especially if done privately—can be quite expensive.

Other kinds of evaluations related to custody might be appropriate, depending upon the circumstances, and would be less extensive—and less expensive. For example, parents might undergo a limited evaluation for assessing the presence of a psychiatric disorder that could affect parenting. Or a child might be evaluated for diagnostic purposes when parents have different opinions about his or her emotional status. Various models exist for partial evaluations, which can also assist the court.[14]

In the clinical interviews during a comprehensive child custody evaluation, the clinician meets with each parent several times, interviews the child separately, and holds at least one joint interview in which the child and each parent are observed together. As noted earlier, home visits are sometimes helpful when there is an issue about a particular home, but they are not mandatory in each case.

The parents are seen for sessions of 45 minutes to an hour or more, usually several times. Sometimes both parents may be seen together at the start of the evaluation or at some other point. The joint session may help the psychiatrist assess the level of conflict and whether or not it is realistic to assume that the parents will cooperate in the parenting of their child.

The clinician will interview the child early in the course of the evaluation. Siblings are seen together at first so they can provide emotional support to one another. Usually, a child as young as 3 years of age can be seen alone. Even children this young understand that there is conflict going on around them and that the doctor is trying to help the family sort things out. Three-year-olds are able to appreciate that their parents are fighting over them, and they can understand the role of the judge. The evaluator should strive to develop a warm and comfortable relationship with the child by using age-appropriate means of communication. For young children, the medium is play. It is helpful to have drawing materials, blocks, and a dollhouse for the young child to explore.

In one poignant session, for example, a 6-year-old girl was drawn to the dollhouse and found some toy figures of children. She immediately placed the child figures inside the house, near a window, and then threw them out of the house, onto the pavement below. All the while she exclaimed to the psychiatrist, "All the children are being thrown out of the house! Look! They're all being kicked out!" The evaluator can explore such powerful themes with the child and convey the child's psychological state to the court.

In the session with the parent and the child, the evaluator usually allows the parent and younger child a session of unstructured play, during which the evaluator is more of a passive observer. Older children and parents may engage in discussion as well as some play, and the evaluator may participate. Even though this joint session may seem artificial and forced and may also cause parents anxiety because they are being "watched," it can still provide much data to the clinician about how parent and child interact.

For example, in one joint session observed by the author, as a 9-year-old girl was drawing, her mother kept interrupting her, requesting that the child play with some paper figure the parent was constructing. The child repeatedly told her mother she wished to draw at that moment. Her mother, however, was insistent. The child, with an expression of sadness and resignation on her face, ultimately complied. Each time the child tried to return to her chosen activity, the parent forced her to attend to what the parent was creating. Such an interaction was notable, because it served as a microcosm for similar ways in which this particular parent repeatedly and insensitively imposed her will upon her daughter at other times.

ISSUES TO BE ASSESSED

As illustrated above, in speaking with and observing the parents and the child, the evaluator assesses a number of important issues that can have direct bearing upon his or her ultimate recommendations to the court. These issues can include the continuity and quality of the attachments between parent and child; a child's parental preference, if offered; whether or not a child and parent have become alienated from each other; any special needs the child may have and whether the parent displays appropriate sensitivity to them; educational planning; gender issues, when relevant; relationships with siblings; the physical and psychiatric health of the parents and the child; the parents' work schedules, finances, styles of parenting and discipline, and styles of conflict resolution; social support systems in place; pertinent cultural or ethnic issues; and religion.

There may also be issues unique to a particular family that will be assessed as part of the comprehensive child custody evaluation. Following are common issues that can complicate such cases: a parent with a psychiatric disorder, including substance abuse; a homosexual parent; a grandparent seeking custody and litigating against a parent; move-away (sometimes called "relocation") cases, allegations of sexual abuse; allegations of or proven domestic violence, and complex issues brought forth by advances in reproductive technology.[15]

In all of these categories, the particular issue is assessed in terms of the parent-child relationship. For example, a parent with a diagnosis of bipolar disorder is not automatically deemed unfit to have custody. The evaluator

assesses the nature of the illness in the particular parent, how that parent handles it and cares for him- or herself, and whether or not there has been or is likely to be any direct impact upon the child.

The same holds for a parent's medical or physical health. California case law, for example, treats a parent's medical condition as a factor—but not the determinant factor—when addressing the best interest of the child. A parent with a serious medical illness or physical handicap is assessed with regard to the issues of the overall parent-child relationship, attachment, and general ability to care for the child.[16]

Similarly, under California case law, the financial situation of a parent is not a permissible basis for making a custody decision. If a custodial parent does not have adequate financial resources to care for the child, custody cannot be changed based on that factor. Instead, the custodial parent might seek to increase child support.[17]

In California, New York, and a number of other states, a parent's sexual identity cannot in and of itself be the basis for a custodial decision. It may be considered as one of a number of factors that may affect the child-parent relationship or the home environment. In other states, however, homosexuality alone has been the basis for denying custody, overnight visitation (when the homosexual parent's partner is present), and even becoming a foster or an adoptive parent.

In a number of states, including California and New York, the presence of domestic violence in a family has direct bearing upon a custody determination. This is because it has been well recognized by social scientists and lawmakers alike that exposure of a child to domestic violence—even when the child is not directly abused himself—is detrimental to a child's well-being and emotional development.

In California, rule 1257.7 of the California Rules of Court addresses domestic violence training standards for court-appointed child custody investigators and evaluators. As of January 1, 1998, no one can be court appointed as a child custody evaluator unless he or she has completed domestic violence training. The rule specifically calls for the evaluator to complete the basic training in domestic violence described in California Family Code section 1816 (which should cover the effects of domestic violence on children, social and family dynamics of domestic violence, and techniques for identifying and assisting families affected by domestic violence), plus 16 hours of advanced training. The advanced training must be completed within one year and is to be followed by annual update training. The training is quite comprehensive and includes classroom instruction on all aspects of domestic violence and its impact on child-parent relationships and parenting, including the role of drug and alcohol use and abuse in domestic violence and their effects on custody determinations.[18]

The issue of a parent wishing to move away following the divorce, taking the children with him or her, is becoming more common across the country. This additional complicating factor is a natural outgrowth of the confluence of two demographic phenomena: our mobile society and its high divorce rate. These cases can be agonizing—especially for the families contemplating relocation—but also for clinicians assessing family members and judges having to render decisions.

In *Tropea v. Tropea*, an important and far-reaching decision on two consolidated appeals, New York State's highest court, the Court of Appeals, addressed this issue. For the majority, Justice Titone wrote: "Relocation cases such as the two before us present some of the knottiest and most disturbing problems that our courts are called upon to resolve. In these cases, the interests of a custodial parent who wishes to move away are pitted against those of a noncustodial parent who has a powerful desire to maintain frequent and regular contact with the child. Moreover, the court must weigh the paramount interests of the child, which may or may not be in irreconcilable conflict with those of one or both parents."[19]

In *Tropea*, the court abandoned the previously used three-tiered approach to this problem: first, a court examined whether a move would deprive the noncustodial parent of regular and meaningful access to the child; if not, no further analysis was necessary. If answered in the affirmative, courts then presumed the move to be not in the best interest of the child, and the parent wishing to move would have to demonstrate "exceptional circumstance" as justification. With that hurdle passed, courts went on to consider the child's best interest.

In the *Tropea* decision the New York State Court of Appeals adopted a best-interest view of the entire matter: "[E]ach relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child."[20]

Now, as a result of *Tropea*, in New York State—and most likely in a number of other states as well—the mental health professional again plays an important role in assessing family factors that go to the ultimate question. The clinician must look at a number of factors, including how a child would cope with the loss of more frequent and regular contact with the parent not recommended to have custody, the psychological impact of severing ties with a known community and establishing new ones elsewhere, which parent would better facilitate appropriate contact between the child and the parent not awarded

custody, how the moving parent would help in the child's psychological adjustment (if the child moves with that parent), and the motivation for the move-away plan. Yet even with the most careful analysis by the mental health professional, any conclusions will still be educated guesses about what the future will hold for the child and the family.

In approaching these issues, the mental health professional always returns to the fundamental issue of *parenting*—and in the context of the best interest of the child. The evaluator records and interprets the parents' characteristics in the context of the custody dispute. Child psychiatrists, especially, rely upon their particular skills in diagnosis, recognizing, and understanding the dynamics of family interaction and child development as they conduct these interviews. They assess a parent's concept of the best interest of the child and particularly how a parent does or does not wish to include the other parent in the life of the child. Finally, as he or she gets ready to prepare the report, the evaluator focuses on the level of attachment between each parent and the child and each parent's overall sensitivity to the needs of the child.

THE REPORT

The written report is the culmination of the evaluation. It represents the sum and substance of everything the evaluator has done. It becomes a document frequently introduced at trial; it is a reflection of the quality of the work; and, sometimes, it can even serve as the basis for a settlement. The report requires a great deal of thought, care, and sensitivity on the part of the evaluator, for it is a permanent record and can have tremendous impact upon the case.[21]

The report should be written clearly and without undefined psychiatric jargon. It should be long enough to be comprehensive but short enough to maintain the judge's interest. The report begins with the questions it will address, includes a list of the people interviewed in person and by telephone, the amount of time spent on each interview, and a list of all documents reviewed in conjunction with the evaluation (such as legal papers, diaries, notes, faxes, or e-mails provided by litigants). The report should also contain summaries of the interviews. Direct quotations are exceedingly helpful in conveying the tenor of the interviews. In a final section, perhaps titled "Conclusions and Recommendations," the evaluator provides his or her formulation of the case along with specific suggestions about custody, visitation, and any other recommendations.[22]

The written report ought to be free of inflammatory language that may reflect the expert's bias or value judgments. Psychiatric diagnoses are not necessary because this is an evaluation of *parenting*, not a standard psychiatric report. Finally, the report should be written with the expectation that at some point a parent might read it. The standards of practice regarding distribution of the report vary from state to state. Not all judges permit parents to have their own copies of the report. In California, however, Family Code section 3111 requires that the report "be filed with the clerk of the court in which the custody hearing will be conducted and served on the parties or their attorneys."[23] In the written report, the evaluator has the opportunity to provide feedback to a parent that can be helpful as the family moves on after the litigation.

COMMON PITFALLS

While this overview of the custody evaluation may suggest that the process is relatively straightforward, all too often court-appointed experts make serious errors that can neutralize the evaluation's impact. Occasionally the errors are so severe that the judge may order an entirely new forensic evaluation, thus putting the family through the stressful, emotional (and expensive) process all over again. Errors can occur at any point: at the time the expert accepts a case, during the course of the evaluation, and in the writing of the report. Unfortunately, the expert operates without any ongoing oversight, so that the full impact of an error may not be appreciated until much later. If courts, attorneys, and clinicians develop an awareness of common pitfalls in this process, families could be better protected and courts better served.

THE "TWO HATS" SYNDROME

One of the most common and dangerous errors made by psychiatrists and other mental health experts performing custody evaluations is to act in both a forensic and a therapeutic capacity. The usual pattern is for a child to be in psychotherapy and for the family to subsequently become involved in a custody dispute. This problem can also arise when a child is being treated in an in-patient psychiatric unit, Child Protective Services is involved in placement planning (and disputing placement with a family member wishing to take care of the child), and the treating psychiatrist is asked for an opinion about where the child should live. A related problem occurs when the court asks the treating therapist to make recommendations regarding the circumstances under which visitation should occur: How often? Should there be supervision? If so, for how long should it continue?

The "two hats" syndrome is illustrated by the following scenario. A therapist was treating a 7-year-old girl whose mother made certain allegations of sexual abuse against the father, with whom she was involved in a divorce action. The mother repeatedly told the therapist about

strange and sexually explicit statements that the little girl allegedly made. The therapist was contacted by the mother's attorneys, who asked her to prepare an affidavit supporting restricted and supervised visitation for the father. The therapist prepared the affidavit and even agreed to testify in a court hearing. At the hearing she recommended that she be the "gatekeeper" of the father's visitation and be allowed to determine when and under what circumstances it would occur. At the same court hearing, however, she testified that she was not an expert on evaluating allegations of sexual abuse, had never performed such an evaluation in this case, and, in fact, had never discussed the allegations with the father—only with the mother and with her attorneys.

The judge, mindful of her need to protect the child and unsure of what really did transpire, agreed that the therapist should serve in that capacity. The result was that the father was now alienated from the therapist and his daughter's treatment. His alliance with the psychiatrist had been permanently damaged. The child was quite upset when she learned the doctor had gone to court to talk about her. And the confidentiality and her special relationship she had with her doctor had been violated.

The forensic and therapeutic roles serve very different purposes and are fundamentally incompatible.[24] Treating therapists serve to protect their patients' interests and to avoid causing them harm. An important aspect of therapy is that confidentiality is protected except in very specific and limited circumstances. This holds even for children, except in cases of emergencies where a child's health or safety may be in jeopardy. The forensic therapist, in contrast, works within a justice system seeking truth. The traditional doctor-patient relationship does not exist in this sphere. The patient is warned at the beginning of the forensic evaluation that confidentiality will not be protected. Therefore, combining the two roles damages the therapeutic alliance and reduces the credibility of the forensic evaluation.[25]

In child placement conflicts, the therapist providing forensic "guidance" to the court damages her special relationship with the child and the parents. In addition, her objectivity and ability to gather evidence become seriously compromised. The result is a failed therapy and a substandard forensic investigation.

Practice parameters for child custody evaluation developed by the American Academy of Child and Adolescent Psychiatry specifically warn evaluators against falling into the "two hats" syndrome in a section entitled "The Role of the Evaluator."[26] Psychologists have also been cautioned against acting as therapist and as forensic evaluator in section II-7 of the *Guidelines for Child Custody Evaluations in Divorce Proceedings.*[27]

THE "HIRED GUN"

Although experts agree that mental health professionals performing child custody evaluations ought to be court appointed, there are those who still offer opinions via one-sided evaluations. Some hardly do evaluations at all but instead rely upon information supplied by attorneys for one side.

For example, a mother in a custody case opposed the father's request for overnight visitation with their 3-year-old son and hired her own child psychiatrist. This doctor never saw the child or the father but still submitted an affidavit in opposition to the overnight visitation.

Sometimes, one side is not satisfied with a court-appointed expert's forensic report and decides to find a psychiatrist or other mental health professional who can take a position more favorable to him or her. Some psychiatrists then agree to interview one parent and the child, separately and together, and then issue a report lauding this parent-child relationship. Courts should give little credence to such one-sided and clearly partial evaluations. Although in many jurisdictions a judge cannot prevent such evaluations, they should be severely condemned. A child is put through another series of interviews in a process that takes advantage of the parent's anxiety about a prior unfavorable evaluation.

One-sided evaluations—particularly those that go to the ultimate question of custody without including all of the parties—do a disservice to all: the court, the profession, and especially the family. Forensic psychologists as well as child and adolescent psychiatrists performing child custody evaluations have in their practice guidelines and parameters cautions against one-sided evaluations.[28]

BIASED EVALUATORS

Sometimes, a forensic report in a custody dispute clearly indicates that despite his or her professional training and experience the clinician has demonstrated bias in conducting the evaluation. Bias and personal value and moral judgments have no place in a forensic evaluation. They color the process and complicate matters for the court.[29]

For example, in one report, the court-appointed expert made it known that she did not look favorably upon the father because he was in show business. The report included a number of references to the person coming home late at night (after performing in a play) and associating with various eccentric characters. These factors, the psychiatrist felt, were detrimental to the child's growth and development. Another court-appointed expert wrote in his report that a father's apartment was beautifully decorated with lovely artwork and that the bookshelves were well stacked with outstanding volumes. The mother's

apartment was described as being cluttered with too much furniture and with few artworks on display.

Sometimes the expert's point of view is more subtle, as when the psychiatrist describes one parent as "rigid" or "stubborn" and the other parent as "someone who perseveres" or has "the courage of her convictions." Some psychiatrists deem a parent unfit based solely on a psychiatric diagnosis or sexual identity instead of putting that diagnosis or sexual identity in its proper context as it relates to parenting. One psychiatrist offered his biased point of view during a forensic consultation with a father who wanted restricted visitation for his child because the child's mother was a lesbian. The child psychiatrist told the mother that if she wanted to "live on the fringes of society," that was her choice, but she had no business involving the child.

Bias is a long-recognized problem and has no place in these evaluations. It serves only to cast doubt upon the competence of the evaluator and detracts from the value of the entire process. Psychiatrists learn in their training to monitor their own emotional reactions to patients in order to free themselves to perform their work fairly and effectively. Forensic psychiatrists, who may hold tremendous power by virtue of their findings, must be especially mindful of their own biases. Section II-6 of the American Psychological Association's published child custody guidelines[30] calls for clinicians to strive to overcome their possible biases. Therefore, the court, when reading forensic reports, must be vigilant as to possible bias.

MISUSE OF DATA

A common error made by some forensic evaluators is to misuse or fail to use data that are gathered during the course of the process. For example, a frequent mistake is to confuse one's role as the expert with that of the trier of fact, deciding which party is telling the truth. In one report, the psychiatrist spent many pages reviewing an argument over finances, finally offering his own conclusions about whether or not the husband was in fact hiding assets as well as whether or not he did assault his wife.

Sometimes mental health professionals assume that because they are behavioral experts, they need not supply supporting information, only an opinion. For example, one evaluator concluded a particular parent was clearly the child's "psychological parent." Yet there were no supporting statements to defend this conclusion and not even a definition of "psychological parent." It was as if the expert were saying, "This is so because I am a doctor and say it is so."

A related, all-too-common error is that the expert draws certain conclusions at the end of the report, but the conclusions do not appear to follow from the data presented. In one report, a psychologist repeatedly criticized a father, finding numerous faults in his parenting abilities and his overall character while describing the mother in glowing terms. At the end of the report, however, the expert recommended that the father have custody. There was no explanation for this seeming turnabout. The expert only succeeded in alienating both sides and the court. The result was that the judge threw out the entire report and ordered a new evaluation by another expert.

Psychologists are cautioned about the proper use of collected data in sections III-11 and III-12 of the *Guidelines for Child Custody Evaluations in Divorce Proceedings.*[31] Child and adolescent psychiatrists receive similar guidance in their practice parameters in section II-N.[32]

The person reading the report should be aware of a flow in the data leading to a comprehensive and understandable formulation at the end. The conclusions and recommendations should follow logically, as in a geometric proof. They should not take the reader by surprise. The court should easily follow the expert's reasoning and should clearly understand how the evaluator reached his or her conclusions.

MISUSING THE LITERATURE

Nowhere are opinions more passionate or more unsupported by hard science than in child custody evaluations. Articles published in peer-reviewed journals can be invoked to support almost any reasonable position the expert takes. Should a 2-year-old child be allowed overnight visitation? Can a breast-fed infant be away from her mother? Is joint custody a viable option? Should the children be allowed to remain in the marital home, with the parents moving in and out? Is a midweek overnight too disruptive to school-age children? Which parenting arrangement predicts the children's future well-being?

Sometimes experts will cite certain articles in the professional literature to bolster their particular point of view. There is disagreement, for example, regarding whether infants and toddlers should be permitted overnight visitation with a separated parent. A mental health professional may have a bias in favor or against, and it can appear more "scientific" to quote published research in support of one's stance. It is important to note that clinical research on this subject is fraught with problems, including choice of population studied, adequate numbers, and the ever-present dilemma of confounding variables. In other words, when investigators look at families going through custody disputes and gather follow-up data, there may be any number of intervening factors that complicate research conclusions. And, while a particular set of conclusions might apply to the population studied, it may not fit all families.

Because such studies may be unique to the population studied and may not have universal relevance, courts are obliged to recognize their limitations. While all concerned would like convincing "hard data," the expectation that that is a practical possibility—at least for the time being—is unrealistic. Every family is different. The temperaments of all children—even those of the same age—are different. It follows that the "best interest" of those children may vary.

The scholarly literature may be helpful in explicating certain truths regarding child development, so that, for example, the court can understand the concepts of separation anxiety, attachment, or the impact of the loss of a parent upon a child of a specific age. However, the fact remains that the best mental health guidance for the court comes not from literature but from a careful and comprehensive clinical assessment of the particular family involved.

THE "SPOTLIGHT" SYNDROME

Another common error made by forensic experts might be called the "spotlight" syndrome. Here, the evaluating psychiatrist confuses "good enough" with "perfect" and attempts to identify which parent comes closest to some perceived ideal. Much is made of certain character flaws or quirks, and the expert makes it clear that the court should note these flaws. A parent is criticized for spanking a child after losing his temper. An expert raises objections because a mother goes to an astrologer. A father is held under the glare of the spotlight because he had been married twice before and is, therefore, setting a bad example for his children.

Much of what the expert may criticize during a custody evaluation can be found in all families. These quirks, failings, deviations, or eccentricities are part of the imperfections of all people and are woven into the fabric of every family. No mother or father is perfect. All have made mistakes; all have regrets. Most have idiosyncracies that would otherwise go unnoticed or unrecorded. The forensic evaluator needs to remember that "best interest" is not necessarily perfect or ideal. All mental health professionals evaluating custody disputes need to remember that they are investigating and assessing human beings.

USE OF CONTROVERSIAL TERMS

Occasionally the forensic expert will attempt to add legitimacy to his or her conclusions through the use of certain nonscientific and controversial terms. Examples include the "parental alienation syndrome" and the "sex abuse accommodation syndrome." Such terms, much debated in clinical circles and the professional literature, are frequently used in a conclusory manner, implying the presence of certain factors that would otherwise be left to the trier of fact.

For example, "parental alienation syndrome," coined by a child psychiatrist, has been used frequently in child custody reports as an explanation for the observed phenomenon of a child adamantly opposed to living with or visiting a parent. The term, although not accepted as a distinct and scientific syndrome by organized psychiatry, nevertheless is used to describe such estrangement between parent and child.[33] The use of the term often implies that the expert has direct knowledge of the cause of the so-called alienation when, in fact, he or she does not. Any conclusions about the causes of such estrangement between parent and child, when relevant to final disposition, should be made only by the trier of fact. The psychiatrist might be able to offer hypotheses, but that is all. Again, it must be remembered that every family is unique and that it may have its own particular reasons for the estrangement.

The "sexual abuse accommodation syndrome" has been offered as a description of psychological reactions in those sexually abused.[34] In particular, it has been invoked as a way of explaining delayed reporting of sexual abuse or subsequent recantation. The danger in using this term—especially in a custody dispute, where all too commonly allegations of sexual abuse may arise—is that it too may contain within it certain conclusory judgments based upon facts that the evaluator cannot directly know. There may be unique explanations for the behavior of a child in circumstances in which such allegations may arise. Moreover, the use of the term "syndrome" has varying acceptability in the scientific community. In custody reports the expert must be careful to choose his or her words carefully and to make responsible distinctions between scientific labels and terms of art.

GUARDING AGAINST PITFALLS

Mental health professionals performing child custody evaluations must be ever-vigilant to guard against these pitfalls so that they can assist the court in the best possible way. So it may surprise courts to know that mental health professionals may not have received any formal training in performing child custody evaluations. Even today, when forensic psychiatry has been officially recognized as a distinct subspecialty of psychiatry, with its own board-certifying examination and training requirements, most graduates of psychiatric training programs have had very little exposure to forensic psychiatry. Since most child and adult psychiatrists who are appointed by the court to perform custody evaluations will not have had formal training, where and how do they learn?

PUBLISHED STANDARDS

Various professional societies have published standards and guidelines for performing child custody evaluations. Both courts and clinicians ought to be familiar with these guidelines because they represent the official views of the various organizations. Along with what has been written in the scholarly literature, the guidelines serve as detailed road maps for clinicians. They are probably best known to matrimonial attorneys, who may consult them to mark whether or not a court-appointed expert is "guilty" of serious deviations.

Guidelines have been published by the American Psychiatric Association,[35] American Psychological Association,[36] American Association of Family and Conciliation Courts,[37] and American Academy of Child and Adolescent Psychiatry.[38] These guidelines offer similar recommendations but also take into account individual and stylistic differences among clinicians. Any clinician performing these evaluations ought to be familiar with the published standards and guidelines of his or her own professional discipline.

SPECIALIZED TRAINING

Forensic psychiatry fellowships are usually a year in length and are generally taken at the end of general and child psychiatry residencies. The amount of exposure to training in child custody evaluation varies with the forensic fellowship. In general, most forensic psychiatry fellowships focus on adult matters. There are several national forensic psychiatry professional associations, notably the American Academy of Psychiatry and the Law. The American Psychological Association has a special section devoted to forensic psychology. These professional associations, at their annual conferences and throughout the year, sponsor numerous workshops, courses, panels, and symposia on various aspects of child custody.

Clinicians who perform evaluations in family law ought to avail themselves of these courses and programs on a regular basis. In doing so they can learn about new developments in the field and recent important legal decisions. In addition, they can compare notes with their peers and hone their clinical skills. Courts should take note of the availability of this continuing education and should ask their experts whether they attend such courses.

IMPROVING STANDARDS FOR COURT APPOINTMENTS

If a major requirement for performing child custody evaluations is that the mental health professional is court appointed, it follows that judges should appoint the most qualified clinicians within their jurisdictions. But all too often this is simply not the case. Instead, judges or their law secretaries may appoint "favorites" of the court without regard to their qualifications or the true quality of their work. For example, in one court, an adult psychiatrist frequently appointed by a judge turned in a child custody report of under four pages. The report indicated that each parent was seen only once, for a brief time, and the children were virtually ignored. Nevertheless, the court accepted the report.

Judges determined to set and maintain high standards for mental health professionals doing these important evaluations should familiarize themselves with the standards of the professions and carefully peruse each clinician's résumé. This kind of closer scrutiny is coming, slowly but surely, as courts catch on to the fact that more clinicians are holding themselves out as child custody "experts" because they are looking for ways to earn more money in a clinical endeavor safe from managed care. In New York State, for example, under the guidance and at the request of the Chief Justice of the Court of Appeals, judges, lawyers, and clinicians are collaborating to raise standards for the selection of experts across the state and to institute uniform standards in every county. In a short time, those psychiatrists, psychologists, and clinical social workers wishing to be appointed in custody and visitation cases may have to submit appropriate documentation to be "certified" as a potential court-appointed expert. Bringing uniformity and increased standards to this area can only be good for the families going through this complex, extended, and emotionally draining process.

PEER REVIEW

As the courts become more conscious of the need for high standards in this field, clinicians themselves can help one another gain in skill and knowledge. Mental health professionals new to this work can seek guidance from more-experienced mentors. This can be done on an individual basis or in a more organized fashion. Attending meetings that cross disciplines can be a helpful way of improving and maintaining one's clinical skills. Also, organizations such as the Interdisciplinary Forum on Mental Health and Family Law/New York State provide numerous opportunities for mental health professionals, lawyers, and judges to meet with and learn from one another.

Sometimes the adversarial system provides its own peer review, as when an outside expert testifies about the quality of the report and evaluation conducted by the court's expert. When a substandard report is submitted to the court, there may be a legitimate place for such a critique.[39] The peer-reviewing expert, hired by one side in this case, should confine his or her criticisms only to the court

expert's report and should not interview any of the parties. The critique should be limited to the manner in which the evaluation was conducted and the report written. The peer-reviewing expert of course cannot render any opinion at all on ultimate questions of custody and visitation. What he or she can do is testify whether the report actually reflects a competent evaluation and is in keeping with established standards.

Judges may rightfully have a high index of suspicion when a peer reviewer is brought in by one side—obviously the party who has suffered disappointment in the findings of the court-appointed expert. Nevertheless, the court-appointed evaluator may indeed have submitted a substandard report. This should be brought to the attention of the judge, who can then decide how much weight to give the original report. The peer reviewer, of course, should have impeccable credentials in order to be given credibility by the court.

STANDARDS OF CARE

Standards of care and peer review are accepted mechanisms for quality control when clinicians take care of patients. They also have their place in forensic evaluations. Nowhere is this more important than in child custody disputes, where the future of families is at stake. Courts need to appoint the most competent evaluators, and those experts must be aware of acceptable standards of care. By doing so, they can truly protect the best interest of children.

NOTES

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